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In the Supreme Court

OF THE

United States

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CHARLES ELMORE

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,

Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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Subject Index

I. Page

The California statutes allowing for recovery of damages, where conditions of compensation under the Workmen's Compensation Act do not exist, were not repealed by the Workmen's Compensation Act 1

II.

The decisions of the Appellate Court in California in the case of Ballard v. Sacramento RR., 126 Cal. App. 486, and Walton v. Southern Pacific Company, 48 Pac. (2d) 108, have been approved by the California Supreme Court, and are therefore binding upon this court..... 3

Table of Authorities Cited

Cases

Pages

Ballard v. Sacramento Northern Ry., 126 Cal. App. 486...3, 4, 5
Bohn v. Bohn, 164 Cal. 532..... 4

Elder v. Rose, 63 Cal. App. 545..... 3

Hackelberry v. Sherlock Co., 39 Cal. App. 764..... 3

People v. Davis, 147 Cal. 346..... 4
People v. Rabe, 202 Cal. 409..... 4

Robinet v. Hawks, 200 Cal. 265..... 3

Shelton v. City of L. A., 206 Cal. 544..... 4

Walton v. S. P. Co., 48 Pac. (2d) 108.....3, 4, 5
Weddle v. Heath, 211 Cal. 445..... 3

Statutes and Codes

Civil Code of California, Sections 1969, 1970, 1971..... 2

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SUPPLEMENTAL BRIEF FOR PETITIONER.

Supplementing petitioner's brief, we desire to call the court's attention to two matters:

I.

THE CALIFORNIA STATUTES ALLOWING FOR RECOVERY OF DAMAGES, WHERE CONDITIONS OF COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT DO NOT EXIST, WERE NOT REPEALED BY THE WORKMEN'S COMPENSATION ACT.

On page 29 of petitioner's brief, we stated that "except for a situation covered by the compensation

act the general right of a servant to sue his master for negligence under the common law exists in California."

On page 8 of respondent's brief, it is stated that the California statutes allowing such recovery were repealed by the Workmen's Compensation Act and that no statute exists in California by virtue of which an employee can recover against his master for negligence, where conditions of compensation do not concur.

Counsel for respondent contend that the statutes referred to by them, as being no longer in existence, to-wit: Sections 1969, 1970, and 1971 of the Civil Code of California, were impliedly repealed because of a provision in the California Workmen's Compensation Act of 1917 reading "and all other acts and parts of acts inconsistent herewith are hereby repealed."

This is not correct.

The statutes referred to by counsel for respondent were not repealed by the California Workmen's Compensation Act, but are still in force and effect in California. That such statutes are still in full force and effect is incontrovertible and beyond question.

The Workmen's Compensation Act of 1917, Section 6c, provides that in all cases where conditions of compensation do not concur, the liability of the employer shall be the same as if the act had not been passed. This provision is identical with the provision of the prior Workmen's Compensation Act of 1913, which also contained the identical "repeal" provision hereinbefore quoted.

In *Hackelberry v. Sherlock Co.*, 39 Cal. App. 764, the California Appellate Court held that where conditions of compensation do not concur, all prior statutes, including the statutes hereinbefore referred to, which give to the servant a right of action for damages against his master, are still in force and effect.

This was also held by the Supreme Court in *Robinet v. Hawks*, 200 Cal. 265, following the previous case.

To the same effect, see also:

Weddle v. Heath, 211 Cal. 445;

Elder v. Rose, 63 Cal. App. 545.

It follows therefore that the statement in petitioner's brief, that the servant has a right to sue his master for damages under the common law in California, where conditions of compensation do not concur, is correct.

II.

THE DECISIONS OF THE APPELLATE COURT IN CALIFORNIA IN THE CASE OF BALLARD v. SACRAMENTO RR., 126 CAL. APP. 486, AND WALTON v. SOUTHERN PACIFIC COMPANY, 48 PAC. (2d) 108, HAVE BEEN APPROVED BY THE CALIFORNIA SUPREME COURT, AND ARE THEREFORE BINDING UPON THIS COURT.

Under California practice, the California Supreme Court having approved the decision of the Appellate Court in *Ballard v. Sacramento Northern Ry.*, 126 Cal. App. 486, and *Walton v. S. P. Co.*, 48 Pac. (2d) 108, by denying petitions for hearings, said decisions were the pronouncements of the highest court in California.

In respondent's brief commencing at page 16 thereof, it is stated that the *Ballard* and *Walton* cases supra, are not binding upon this court for the reason that the denial of hearing by the Supreme Court, was not an approval of these opinions, citing *People v. Davis,* 147 Cal. 346, decided July, 1905; *Bohn v. Bohn,* 164 Cal. 532, decided January, 1913; *People v. Rabe,* 202 Cal. 409, decided November, 1927; *Shelton v. City of L. A.,* 206 Cal. 544, decided February, 1929.

However, since the decision in *Shelton v. City of L. A.,* supra, the California Supreme Court has adopted and followed a *different practice.* It has followed a practice whereby in denying petitions for hearing, it approves the opinions of the Appellate Courts, unless, in its order denying petitions for hearing, it expressly withholds approval of any part of the opinion of the Appellate Court. Previous to the adoption of this practice, as pointed out in our brief (p. 30), the denial of a hearing was an approval of the *conclusion* of the District Court. *Now* it is an approval, as well, of the *opinion.*

We have examined the decisions of the Supreme Court of California, denying hearings in all cases reported subsequent to Vol. 125, Cal. App. Reports. We selected this volume as a starting point for the reason that it is the volume which immediately precedes the volume in which the decision in the *Ballard* case supra is reported. We have listed in the appendix to this brief, a long series of orders of the Supreme Court, from that volume (125 Cal. App. Rep.) down to date, for the purpose of showing that

this practice has been consistently and regularly followed by the California Supreme Court.

Therefore in view of this recent and presently existent practice in California, it cannot be disputed, and is now generally recognized in California, that a denial of a petition for hearing by the Supreme Court, after decision by the District Court of Appeal, is an approval by the Supreme Court of the opinion and decision of the Appellate Court, unless otherwise specifically stated in the decision of the Supreme Court upon petition for hearing directed to it. Under California practice, the decisions in the cases of *Ballard* and *Walton,* supra, were decisions of the highest court of the State of California and are binding upon this court.

Dated, San Francisco, California,
March 27, 1936.

Respectfully submitted,
HERMAN A. BACHRACK,
Attorney for Petitioner.

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Of Counsel.

(Appendix Follows.)

Appendix

Gill v. Johnson, 125 Cal. App. 296, at 302, October 3, 1932.

A petition for a rehearing in this cause was denied by the District Court of Appeal on August 29, 1932, and an application by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on October 3, 1932, and the following opinion then rendered thereon:

"The Court. The petition for hearing in the Supreme Court is denied.

Our denial of the petition for transfer in this cause is based upon the ground that enough appears on the face of the proceedings to show that Austin is primarily liable for the loss sufferred by respondents and that the Torrens title fund (Stats. 1915, p. 1932) may not be resorted to until an execution against Austin shall have been returned unsatisfied. It was the duty of the court to require the presence of Austin. (Stats. 1915, sec. 105, p. 1932; Code Civ. Proc. sec. 389; O'Connor v. Irvine, 74 Cal. 437, 442 (6 Pac. 236); Mitau v. Rodday, 149 Cal. 1, 8 (6 A. L. R. N. S.) 275, 84 Pac. 145.) Lake v. Dowd, 207 Cal. 290, 293 (277 Pac. 1047).)

We withhold our approval from that portion of the opinion which holds that the demurrer was sufficient in form."

Cullen v. Board of Education, 126 Cal. App. 510, at 513, November 28, 1932.

The petition for a rehearing of this cause was denied by the District Court of Appeal on October 29, 1932, and an application by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 28, 1932, and the following opinion then rendered thereon:

"The Court. The petition for hearing is denied.

In denying a hearing, however, we withhold approval from that portion of the opinion of the District Court of Appeal which holds that the two employments of petitioner constitute but one position."

Anderson v. Board of Education, 126 Cal. App. 514, at 521, November 28, 1932.

The petition for a rehearing of this cause was denied by the District Court of Appeal on October 29, 1932, and the opinion was modified to read as above; and an application by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 28, 1932, and the following opinion then rendered thereon:

"The Court. The petition for hearing is denied.

In denying a hearing, however, we withhold approval from that portion of the opinion of the District Court of Appeal which holds that

the two employments of petitioner constitute but one position."

People v. Cimar, 127 Cal. App. 9, at 15 and 16, October 29, 1932.

A petition for a rehearing of this cause was denied by the District Court of Appeal on October 29, 1932 and an application by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 10, 1932, and the following opinion then rendered thereon:

"The Court. Petitioner's application to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Third Appellate District is denied. Anything in the opinion in the case of People v. Burns, 75 Cal. App. 84 (251 Pac. 935) contrary to the decision herein is hereby expressly disapproved."

Smellie v. Southern Pac. Co., 128 Cal. App. 567, at 583, March 9, 1933.

A petition for a rehearing of this cause was denied by the District Court of Appeal on February 8, 1933, and an application by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 9, 1933, and the following opinion then rendered thereon:

"The Court. Respondents' petition to have the above-entitled cause heard and determined by this court after judgment in the District

Court of Appeal of the Third Appellate District is denied.

Such denial, however, shall not be construed as an approval by this court of that portion of the opinion of the District Court of Appeal which holds that admission of evidence of the rules adopted by the defendant for the government of its business was incompetent and prejudicial."

Russell v. Ruffcorn, 132 Cal. App. 215, at 232, July 21, 1933.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on July 21, 1933, and the following opinion then rendered thereon:

"The Court. In denying the petition for a transfer of this cause to this court after decision by the District Court of Appeal we withhold approval of that portion of the opinion which declares that the revocation of the permit automatically released the impounded stock. However, under the facts and findings recited by the District Court of Appeal, there can be no doubt but that the plaintiff was equally intent with defendants in his determination to obtain the stock without regard to and in defiance of the order impounding the stock. Hence the doctrine of Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467 (209 Pac. 36), concludes the argument of petitioner here. Petition for hearing denied."

Walters v. Du Four, 132 Cal. App. 72, at 88 and 89, July 17, 1933.

A petition for a rehearing of this cause was denied by the District Court of Appeal on June 17, 1933, and an application by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on July 17, 1933, and the following opinion then rendered thereon:

> "The Court. In denying the petition for a hearing of this cause by this court, we withhold our approval of that portion of the opinion which, in effect, sanctions the form and substance of instruction No. 38, but if error was committed in the giving of the instruction (a point which we do not decide), it was cured by instruction No. 8, as indicated in the opinion. Petition denied."

Roy v. Smith, 134 Cal. 240, at 246, November 17, 1933.

A petition by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 17, 1933, and the following opinion then rendered thereon:

> "The Court. In denying the petition for a hearing in this court we are not to be understood as approving that portion of the opinion of the District Court of Appeal relating to the applicability of the doctrine of res ipsa loquitur in determining the sufficiency of the pleading. The petition for hearing is denied."

Crow v. Board of Supervisors, 135 Cal. App. 451, at 465, January 22, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on January 22, 1934, and the following opinion then rendered thereon:

> "The Court. Appellant's petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the Third Appellate District, is denied, but the court withholds any opinion with regard to the question as to the proper interpretation of section 20 of article XI of the Constitution."

Jackson & Perkins Co. v. Irrigation Dist., 136 Cal. App. 375, at 381 and 382.

A petition by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 26, 1934, and the following opinion was then rendered thereon:

> "The Court. In denying said petition we withhold our approval of the last paragraph of the opinion of the Appellate Court as the statements therein are not necessary to said decision."

People v. Graves, 137 Cal. App. 1, at 21, March 19, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court

on March 19, 1934, and the following opinion then rendered thereon:

> "The Court. In denying said petition we think it appropriate to state that while we are in accord with the District Court of Appeal in its ruling that it was error for the trial court to refuse to give the instruction regarding circumstantial evidence, we are not entirely satisfied that the error was cured by giving the other instructions referred to in said opinion. However, the court in the closing paragraph of its opinion states that the case is just such a one as is contemplated by the framers of section 4½ of article VI of the Constitution, which provides that no judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. In our opinion, the evidence in the case points unerringly to the guilt of the defendant. We hardly believe that the verdict of the jury in this case would have been any different had the court given the instruction as to circumstantial evidence. We are of the opinion, therefore, that no miscarriage of justice has resulted from said error and that the court properly refused to reverse the judgment on account of said error.
>
> Preston, J. and Langdon, J. voted for a hearing."

People v. Breyer, 139 Cal. App. 547, at 551, August 2, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 2, 1934, and the following opinion then rendered thereon:

> "The Court. The petition of appellant for a hearing of this cause is hereby denied. (8) Said petition, of course, does not ask for a hearing of that portion of the decision of the District Court of Appeal which reverses his conviction under the second count of said indictment. This order denying said petition is, therefore, necessarily confined to that portion of the opinion dealing with appellant's conviction under the first count of said indictment, and is not to be construed as an expression of approval or disapproval of any other portion of said decision."

People v. Aguilar, 140 Cal. App. 87, at 97, August 20, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 20, 1934, and the following opinion then rendered thereon:

> "The Court. The petition for hearing is denied. In denying said petition we withhold our approval of the statement in the opinion that under section 112 of the California Vehicle Act the crime of driving an automobile by any person upon a public highway while under the in-

fluence of intoxicating liquor is not defined as a felony."

Karle v. Reed, 1 Cal. App. (2d) 144, at 151, November 26, 1934.

A petition by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 26, 1934, and the following opinion then rendered thereon:

"The Court. The petition for a hearing is denied. In denying a hearing, however, we think that the judgment should be affirmed under the provisions of article VI, section 4½ of the Constitution, and we withhold approval of that portion of the opinion of the District Court of Appeal which deals with the admissibility of the contract provision and the propriety of the instruction of the trial court thereon."

Metcalf v. Metropolitan Life Ins. Co., 1 Cal. App. (2d) 481, at 492, December 17, 1934.

A petition for a rehearing of this cause was denied by the District Court of Appeal on November 17, 1934, and an application by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on December 17, 1934, and the following opinion then rendered thereon:

"The Court. The petition is denied. In denying said petition, we withhold our approval of that portion of said opinion relating to section 450 of the Civil Code.

Preston, J., voted for a hearing."

Curtis v. Title Guarantee etc. Co., 3 Cal. App. (2d) 612, at 622, March 14, 1935.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 14, 1935, and the following opinion then rendered thereon:

"The Court. On the record the appeal of the Title Guarantee and Trust Company is correctly decided by the District Court of Appeal.

In addition it may be said that the company dealt with the property as its own, received the money paid by the plaintiff, and the trial court properly found on the evidence that it was not true that said company had turned over to the alleged beneficiaries the money so paid. Acting as principal in the transaction and through its own agent the defendant made no showing that its relationship of trustee, secret and undisclosed so far as the plaintiff was concerned, should relieve it from responsibility as a principal to return the money paid by reason of the fraud of its agent, especially when so fas as the record shows, it continued to retain the money paid by the plaintiff. On the facts the case is ruled on the theory of Wedge v. Security First Nat. Bank, 219 Cal. 113, 25 Pac. (2d) 411; and Speck v. Wylie, supra. To limit the judgment to one against the defendant in its representative capacity only, as was done in Gist v. Security Trust & Savings Bank, 218 Cal. 581, 24 Pac. (2d) 153, would not be justified on the record presented.

By denying a hearing, we do not necessarily approve the apparent holding of the District

Court of Appeal that laches is in every instance an affirmative defense.

The petition for hearing after decision by the District Court of Appeal is denied.

Langdon, J., and Thompson, J., voted for a hearing."

Gerson v. Kelsey, 4 Cal. App. (2d) 158, at 163, March 25, 1935.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 25, 1935, and the following opinion then rendered thereon:

"The Court. (6) In denying the petition for a hearing herein, we withhold our approval of the following statement appearing in the opinion: 'The item of interest "at the rate of twelve (12) per cent per annum payable monthly" which was provided for by the terms of the note, is usurious and void.' Such a provision in a note or other contract does not render it usurious. (Haines v. Commercial Mortgage Co., 200 Cal. 609, 625.)"

Walters v. West American Ins. Co., 4 Cal. App. (2d) 581, at 585-586.

A petition for a rehearing of this cause was denied by the District Court of Appeal on March 15, 1935, and an application by respondent to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on April 15, 1935, and the following opinion then rendered thereon:

"The Court. The petition for hearing in this cause is denied upon the ground that the evidence, as held by the District Court of Appeal, Second District, Division Two, fails to establish the existence of an oral contract of insurance. We expressly withhold approval, however, from that portion of the opinion which tends to indicate that an oral contract of insurance, even if shown to exist, would not inure to the benefit of a person injured by the insured and holding an uncollectible money judgment recovered for such injuries. The latter conclusion was unnecessary to the disposition of the cause and we, therefore, refrain from approving the same and express no opinion thereon."

Estate of Moore, 7 Cal. App. (2d) 722, at 726, August 19, 1935.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 19, 1935, and the following opinion then rendered thereon:

"The Court. The petition for hearing in the Supreme Court after decision by the District Court of Appeal, Third Appellate District, is denied. Because of the amendment of Section 1875 subdivision 3, of the Code of Civil Procedure (Stats. 1927, p. 110) relating to judicial notice, we withhold approval of that portion of the opinion of the District Court of Appeal relating to 'the absence of any pleading or proof as to what the law of Texas may be in regard to the subject of adoption'."

Zellerbach Paper Company v. Virden Packing Company, Vol. 91, Cal. Decisions, 265 (not yet officially reported), February 13, 1936.

Petition for hearing after decision by the District Court of Appeal, First District, Division One (83 Cal. App. Dec. 963) denied.

"The petition for hearing after decision by the District Court of Appeal, First District, Division One, is denied. We withhold our approval of that portion of the opinion which holds that the guaranty relied upon by appellant is not a continuing guaranty. Upon that question we expressly refrain from expressing an opinion."

Fitzgerald v. Terminal Devel. Co., 91 Cal. Dec. 441 (not yet officially reported), March 5, 1936.

Petitions for hearing after judgment in District Court of Appeal, Third District (84 Cal. App. Dec. 77) denied.

"The Court. In denying the petitions for hearing herein we withhold approval from that portion of the decision of the District Court of Appeal of the Third Appellate District, to the effect that the deed here involved, even if ineffective as a corporation instrument, was nevertheless a sufficient conveyance from the president of the corporation, as an individual, to vest title in the grantee named therein."

El Claro Oil & Gas Company v. Daugherty, 91 Cal. Dec. 453 (not yet officially reported), March 16, 1936.

Respondent's petition for a hearing after decision in the District Court of Appeal denied.

"The Court. In denying respondent's petition for a hearing in this court, we withhold our approval from those portions of the opinion of the District Court of Appeal which hold, or can be construed as holding, that the three instruments therein considered were not, when issued separately, within the meaning of section 2, division (a), paragraph 7, of the Corporate Securities Act. It is not necessary to determine these questions at this time. We are convinced that the transactions here involved, when entered into without a permit, constitute a violation of the act.

The petition is denied."